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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-169

PETER THOMAS MESSINA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETER THOMAS MESSINA,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this criminal case on June 27, 1973.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears as Appendix "A" to this Petition. The United States District Court for the Eastern District of New York rendered no opinion.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 27, 1973. This Petition for a Writ of Certiorari was duly served on the United

States and filed in this Court within 30 days of June 27, 1973.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Now that this Court has held that proof beyond a reasonable doubt is a constitutional requirement in criminal cases (*In re Winship*, 397 U.S. 358 (1970)), can Petitioner be convicted solely on the uncorroborated co-conspirator testimony of his brother, pursuant to the evidentiary rule thought to have been announced in *Caminetti* v. *U. S.*, 242 U.S. 470 (1917)?

2. Are Petitioner's Fifth or Sixth Amendment Rights violated by a count of an indictment which charges a conspiracy to violate 18 U.S.C. § 474 when that count:

A. fails to charge any individual subsection or individual subsections of the statute, but which instead combines two such subsections which apparently contradict each other; or when that count

B. so fails to make clear what part of the statute Petitioner allegedly conspired to violate that the Chief Judge of the District was moved to characterize the count as "pretty fudgy"?

Constitutional Provisions Involved

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ."

Statutory Provision Involved

18 U.S.C. §474: Plates or stones for counterfeiting obligations or securities

[1] Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, uses such plate, stone, or other thing, or any part thereof, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or

[2] Whoever makes or executes any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or

[3] Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or

[4] Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after

or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or

[5] Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

[6] Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or

[7] Whoever has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States—

Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both. June 25, 1948, c. 645, 62 Stat. 706.

Statement of the Case

The Charges

Petitioner and his brother John were charged in a three-count indictment* in the United States District Court for the Eastern District of New York.

Count 1 charged a conspiracy (18 U.S.C. § 371), apparently to violate 18 U.S.C. § 474 ("Plates or stones for counterfeiting obligations or securities").

Count 2 charged a substantive 18 U.S.C. § 474 offense.

Count 3 charged a substantive 18 U.S.C. § 472 offense ("Uttering counterfeit obligations or securities").

About three weeks before trial, John Messina pleaded guilty to count 1 (the conspiracy count), and agreed to testify for the government against Petitioner.

The Trial

The essence of the government's case against Petitioner can best be summarized by a quotation taken from the government's trial memorandum:

> "Briefly stated this case is essentially one where only one defendant, John Messina, dealt face to face with an undercover agent of the United States Secret Service negotiating on several occasions for the sale of counterfeit plates. Those negotiations culminated in the arrest of John Messina on September 29, 1971 as he was in the process of delivering an envelope containing counterfeit plates, together with two uncut sheets of counterfeit Ten Dollar Federal Reserve Notes and one completed

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* The indictment is annexed hereto as Appendix "B".

and cut counterfeit Ten Dollar Federal Reserve Note.

The defendant Peter Messina was not present at any of the negotiations nor at the scene of the arrest of his brother and co-defendant John Messina. In fact the Government's case against Peter Messina will rest solely on the testimony of John Messina who will indicate that he received the plates and counterfeit notes from Peter and was acting on Peter's behalf in selling the plates."

What was the testimony of John Messina?

John Messina is Petitioner's brother (67)*. In September, 1971, Petitioner telephoned John and inquired if John was interested in counterfeit $10.00 bills (70); the brothers met that same night (71); Petitioner showed John a counterfeit ten, inquired if John "knew anybody who might be interested in buying in quantity", and John replied that he would "have to look around and see" (72). A week later the brothers met again; Petitioner said "that there was no chance of getting the money any more, that [Petitioner] had plates for sale," and Petitioner showed John two uncut tens which he gave to John (73-74). As a result of feelers John then put out, on September 21, 1971, he was contacted by and met with someone previously unknown to him named Sal (75). He gave Sal a sample ten (76) and the next day Sal telephoned John, saying he had an interested party (76). On September 23, 1971, John, Sal, and someone named Angelo (the "interested party", actually a Secret Service agent) met, bargained, and parted, with Angelo promising to get back to John (77-78). Up to this time, neither John, Sal, nor Angelo had seen any

* References are to pages of the original trial transcript.

plates, nor had John mentioned Petitioner's name, or anyone else's (77-78). Angelo kept in touch with John, and they met again on or about September 24, 1971 (79), at which time Angelo said that he had buyers for the plates if they were "the real McCoy" (80). For the next few days, John testified, he was in frequent telephone contact with Angelo, who wanted the plates, and with Petitioner, who was trying to get them (80-81).

On September 27, 1971, John said, Petitioner turned the plates over to John, and also uncut tens and a regular stamped bill (81-84).

A day or two later John met Angelo, passed the plates, received some of the purchase price, and was promptly arrested by the Secret Service (85-86). This was the extent of John's direct testimony.

On cross examination, he repeated basically the same story (104-133), but he added a few details about what had happened during the post-arrest interrogation: John originally had told the Secret Service that he found the plates (135-136), but after he had been questioned all night (138), and apparently after some not too subtle suggestions from the Secret Service about the trouble he was in and how some leniency might be arranged (137-138), John changed his story and said he had obtained the plates from Petitioner (139). Later, Petitioner was brought in, under arrest, and John told him that he had told the Secret Service that he obtained the plates from Petitioner (150-151).

On redirect John testified that between the time he and Petitioner were arrested, and hours later when they were lodged in the West Street jail, Petitioner "denied everything. He claimed that . . . I was lying" (165).

The government's next witness was Angelo, the Secret Service undercover agent (173-199). He confirmed John's contacts with him. Cross examination added nothing (199-218).

Up to this point in the trial, this was the government's case: on the one side, John had testified that Petitioner was his principal, or co-conspirator; however, on the other, the following was uncontroverted:

1. there was no evidence that John ever told his wife of Petitioner's somewhat surprising (70), alleged initial telephone call, or that John was seeing Petitioner again, or that John and Petitioner were involved in any transaction;

2. there was no evidence that anyone ever saw John and Petitioner together at the times John testified about, or at any other times;

3. John never, even once, mentioned Petitioner by name, first or last, either to Sal or to Angelo;

4. when John made telephone calls in Sal's and/or Angelo's presence, allegedly to Petitioner, John never said he was calling his brother;

5. when arrested, John told the Secret Service that he had found the plates (135-136), implicating Petitioner only after a long night with the Secret Service and a realization of what he, John, faced (137-139);

6. when Petitioner saw John on the night of their arrest, Petitioner had, to John's face, denied any involvement, and called John a liar (165);

7. the government did not find any of Petitioner's fingerprints on the plates, a fact the government itself apparently considered exculpatory. (See items 2 and 3 of the government's Bill of Particulars and discovery, and 199 and 285).

8. the Secret Service apparently had not even thought of Petitioner in connection with this case, until John implicated him;

9. even though John had $35,000 worth of plates, allegedly belonging to Petitioner, and was to receive $30,000 in cash for them from the government agent, allegedly destined for Petitioner, when John made the sale Petitioner was not there.

The government's third and last witness was Secret Service agent Opfer, who assisted in John's arrest (218). He testified that when John and Petitioner were being taken from agent Opfer's office to the West Street jail, he heard:

> "John Messina said to Peter Messina, 'Pete, we have to cooperate, we have no choice. They caught me red-handed with the plates', and Peter Messina replied to John Messina, 'You are the one that got caught. Why did you get me involved. You should take your own medicine. You know what happens to stool pigeons.' " (221)

Shortly after this testimony, the government rested and the court denied Petitioner's motion to dismiss (231).

Petitioner then testified in his own behalf, denying all involvement with John in anything to do with counterfeiting (232-245). As to the alleged "stool pigeon" conversation, which even John had not testified to, Petitioner testified that it was *John* who had said he [John] could not name his real principals because of what *they* "do to stool pigeons" (243). Cross examination added nothing (245-272).

When the defense rested, the court denied Petitioner's motion for an acquittal (286-287).

The Conviction

The jury convicted Petitioner on count 1 (the conspiracy count), and acquitted him on counts 2 and 3 (the substantive counts).

The Sentence

Chief Judge Mishler sentenced Petitioner to three years in jail, pursuant to 17 U.S.C. § 4208(a)(2).

REASONS FOR GRANTING THE WRIT

The decision below raises significant, and as yet undecided, constitutional questions affecting criminal justice.

I.

Now that this Court has held that proof beyond a reasonable doubt is a constitutional requirement in criminal cases (*In re Winship*), can Petitioner be convicted solely on the uncorroborated co-conspirator testimony of his brother, pursuant to the evidentiary rule thought to have been announced in *Caminetti v. U.S.*, 242 U.S. 470 (1917)?

After all the evidence was in at the trial, the government's case against Petitioner stood in the same posture as it had when, in his opening statement, the Assistant U. S. Attorney admitted that the government's entire case against Petitioner rested on the testimony of his brother John. The government opened its summation by conceding that this was:

> "a case where one man [John Messina] dealt face to face with an undercover agent while one or more others remained in the background. It's the type of case which can only be proved, and upon the government must rely, *on the testimony of one man.*" (329) (emphasis added.)

Doubtless recognizing the fundamental absence of proof against Petitioner based on John's testimony alone, perhaps anticipating the trial court's charge, and perhaps even suspecting the eventual nature of Petitioner's argument to the Court of Appeals and to this Court, in his summation the Assistant U. S. Attorney sought to find something somewhere, anywhere, to tie Petitioner to John's sale of the plates to the government agent:

> "I suggest to you, and I submit to you, that the testimony of John Messina is corroborated in many rather subtle ways." (331)

Apparently, what the Assistant U. S. Attorney meant—and was trying to show—was that there was some evidence to support John's testimony. What the government was alluding to eloquently indicates the insufficiency of the government's case based on John's testimony alone:

> "First of all, we know very surely and clearly that another man was involved in the case . . . During all of the negotiations with agent Angelone John Messina constantly referred to 'my man' ". (331)

However, it was the government's job to prove, not that some unknown person was involved with John in the counterfeit scheme, but to prove beyond a reasonable doubt that Petitioner was that person. If John naming and incriminating Petitioner was alone insufficient to prove the government's case against Petitioner, it is inconceivable that John's oblique, mysterious allusions to "my man" could suffice to prove that case. Moreover, according to all the government's witnesses, John referred to the mysterious other party only as "my man," and despite these "constant"

(331) references, never once referred to Petitioner by name or by family relationship.

What else did the prosecutor argue? Only the alleged "stool pigeon" dialogue, which supposedly occurred when John and Petitioner were on their way to the West Street jail. Yet the government agent who allegedly overheard the comment did not put it in his case report (221-222, 360). As competent, independent evidence of the commission of a federal crime, this did not even begin to be sufficient. When all is said and done, the government's case against Petitioner came down only to this: John named him as the principal, and when Petitioner first saw John immediately thereafter (in government custody), Petitioner had some rather harsh words for his brother. There was not a shred of other evidence against Petitioner.

Yet because of the so-called *Caminetti* rule (*Caminetti* v. *U. S.*, 242 U.S. 470 (1917))—purportedly allowing conviction on the uncorroborated testimony of a co-conspirator—Petitioner was convicted,* and that conviction was affirmed by the Court of Appeals.

Petitioner contends that neither *Caminetti* nor any other pre-*Winship* case decided by this Court ever held that a federal criminal conviction could rest solely on uncorroborated co-conspirator testimony, but that even if it had been so held, *Caminetti's* purely evidentiary rule may well have been nullified by *Winship's* holding that conviction beyond a reasonable doubt in criminal cases is a constitutional requirement.

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* Petitioner's trial counsel sufficiently preserved the *Caminetti* point (287).

Caminetti involved the question of whether the White Slave Traffic Act applied to the transportation of females across state lines for immoral, but non-commercial, purposes.

Requests were made in the trial court to charge that the testimony of the girls was that of accomplices, to be received with caution, and believed only when corroborated by other evidence. The requests were refused.

In this Court, the majority opinion noted that it was

> ". . . the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence." (242 U.S. at 495).

It should be noted that Justice Day did not specify whether he was referring to corroborated or uncorroborated accomplice testimony. More important, however, is the fact that Justice Day's pronouncement was *dicta*. For in the very next paragraph—the concluding one of the opinion—the Court found that, in addition to the supposedly uncorroborated accomplice testimony, there was indeed "substantial testimony tending to support the verdicts rendered in the trial courts" (242 U.S. at 495). Therefore, it is difficult to conclude that *Caminetti* holds that a federal criminal conviction can rest on uncorroborated co-conspirator testimony alone.

It is interesting to note that even though various Circuits have repeatedly reiterated that an accused may be convicted on the uncorroborated testimony of an accomplice, in all of those cases "the opinions state or show that [like

in *Caminetti* itself] there was *some* independent evidence to corroborate the accomplice's testimony" (*U. S.* v. *Hibler*, 463 F. 2d 455, 458-459 (9 Cir. 1972)). In the past, most of the Circuits have declined to disturb the *Caminetti* rule despite open invitations to do so. (See, for example, *U. S.* v. *Tyminski*, 418 F. 2d 1060, 1061 (2 Cir. 1969)).

However, whatever the *Caminetti* situation may have been pre-*Winship*, Petitioner contends that in view of *Winship* this Court should decide what effect, if any, the constitutional reasonable doubt standard has on an evidentiary rule allowing conviction on uncorroborated co-conspirator testimony.

In his opinion for the Court in *Winship*, Justice Brennan clearly enunciated why proof beyond a reasonable doubt is constitutionally required:

> " . . . use of the reasonable-doubt standard is indispensible to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." (397 U.S. at 364, 90 S. Ct. at 1072).

If, as this Court said in *Winship*, the "moral force of the criminal law" is to be preserved, and even strengthened, then this Court should decide whether conviction solely on uncorroborated co-conspirator testimony satisfies the im-

portant value enunciated by this Court in *Winship*, namely that:

> " . . . every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." (397 U.S. at 364, 90 S. Ct. at 1072).

II.

Are Petitioner's Fifth or Sixth Amendment rights violated by a count of an indictment which charges a conspiracy to violate 18 U.S.C. §474 when that count:

A. fails to charge any individual subsection or individual subsections of the statute, but which instead combined two such subsections which apparently contradict each other; or when that count

B. so fails to make clear what part of the statute Petitioner conspired to violate that the Chief Judge of the District characterized the count as "pretty fudgy."

Petitioner was convicted only on count 1, for conspiring:

> " . . . in violation of Title 18, United States Code, § 474 . . . to sell with unlawful intent, and not under the direction of the Secretary of The Treasury or other proper office, an *impression* in the *likeness* of an obligation of the United States, to wit: a Ten Dollar Federal Reserve Note. . . ." (A9) (emphasis added)

Examination of 18 U.S.C. § 474, which Petitioner supposedly conspired to violate, reveals that it contains seven subdivisions, each of which creates a distinct offense. Yet not one of the seven subdivisions condemns what the indictment seems to charge. Count 1 charged Petitioner with conspiring to sell, and only the third and sixth subdivisions

of 18 U.S.C. § 474 deal with "selling" offenses. However, neither one of them appears to make what is charged in the indictment a crime. The third subdivision deals with *plates;* the sixth subdivision deals with *impressions.* The relevant portion of the third subdivision states: "Whoever sells any such plate . . . except under the direction of the Secretary of the Treasury or other proper officer . . ." The relevant portion of the sixth subdivision states: "Whoever . . . sells any such . . . impressions, except to the United States . . ." Thus, the third subdivision appears to forbid selling plates except under the direction of the Secretary of the Treasury, while the sixth subdivision forbids selling impressions, except to the United States.

But the indictment charges neither of these crimes.

Instead, it charges selling *impressions,* not under the direction of the Secretary of the Treasury. An "impression" is not a "plate"; it is something made on paper from a plate. Although, it is by no means clear, it appears that the draftsman of the indictment, perhaps unwittingly, combined the two paragraphs, and thus actually ended up charging an offense which neither paragraph alone condemns. Regardless of how this happened, however, one thing is clear: count 1 of the indictment does not appear to charge an offense under the statute.

Because of the care with which federal indictments are usually drawn, questions like the instant one have rarely arisen in the circuit courts. When they do, however, especially over a statute such as 18 U.S.C. § 474 which has not had the benefit of very much judicial construction, this Court should resolve whatever pleading doubts there might be. The issue here is not primarily whether Petitioner had

adequate notice (although the Court of Appeals apparently believed that to be the issue); rather, the issue is whether count 1, as drawn, stated an offense. A case closely in point to the instant one is *Fleisher* v. *U.S.*, 302 U.S. 218, 58 S. Ct. 148 (1937). There, count 1 charged that the defendants "unlawfully conspired to possess, and caused to be possessed, stills and apparatus for the production of distilled spirits without having the same registered with the Collector of Internal Revenue as required by law." According to the statute, however, the charge should have been that there was a failure to register the stills with an official called the "District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue." On this basis the Court reversed and remanded, holding that: "The first count failed to state an offense." (302 U.S. at 219, 58 S. Ct. 148). Petitioner submits that his count 1 equally failed to state an offense under 18 U.S.C. § 474, and therefore that this Court ought to grant review in order to ascertain if the government's pleading here was sufficient. (*Potter* v. *U.S.*, 155 U.S. 438; *U.S.* v. *Gooding*, 12 Wheat. 460).

A related point which this Court should resolve in conconection with count 1, is whether in pleading an offense under 18 U.S.C. § 474 the government can do so as ambiguously as it has done in this case. Petitioner makes this contention not with regard to whether he had adequate notice, but with regard to the more fundamental question of whether the ambiguity of count 1 prevented that count from stating an offense.

In count 1, do the words "Ten Dollar Federal Reserve Note" refer to the word "obligation", or do they refer to the word "impression"? The answer to this question is

obviously crucially important. For if "obligation" is the antecedent, then the conspiracy charged in the indictment would appear to be a conspiracy to sell counterfeit federal reserve *notes*. On the other hand, if "impression" is the antecedent then the conspiracy charged in the indictment would appear to be a conspiracy to sell *plates* for counterfeit federal reserve notes (303). This ambiguity was not manufactured by Petitioner in a desperate attempt to overturn his conviction. It was, and is, apparent on the face of the indictment itself. Indeed, the indictment's ambiguity in this respect caused substantial difficulty at several times during the trial not only for Petitioner, but also for Chief Judge Mishler, and for the Assistant U. S. Attorney. In this connection, annexed hereto as Appendix "C" is the lengthy colloquy between the trial judge and both counsel, necessitated by their common effort to ascertain exactly what Petitioner was charged with. Perhaps most apt was Chief Judge Mishler's comment (A18) that count 1 was "pretty fudgy". Petitioner submits that being forced to go to trial on a count characterized by the Chief Judge of the District as being "pretty fudgy" raises substantial questions under both the Fifth and Sixth Amendments.

CONCLUSION

Because the decision below raises significant, but as yet undecided, constitutional questions—one concerning *Winship's* effect on the evidentiary rule of *Caminetti,* and the other involving whether the government can charge an offense by pleading a conspiracy count containing contradictory elements and which is "pretty fudgy"—, this Court should grant Petitioner's request for a Writ of Certiorari and entertain briefs and arguments on the merits.

Submitted by,

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July 20, 1973.

APPENDIX "A"

Opinion of The United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 929—September Term, 1972.

(Argued May 31, 1973 Decided June 27, 1973.)

Docket No. 73-1423

UNITED STATES OF AMERICA,

Appellee,

v.

PETER THOMAS MESSINA,

Defendant-Appellant.

Before:

MOORE, FRIENDLY, FEINBERG,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge*, convicting appellant, after a trial by jury, of conspiring to sell counterfeit plates, in violation of 18 U.S.C. §§ 474 and 371.

Affirmed.

ROBERT L. CLAREY, Assistant United States Attorney (Robert A. Morse, United States Attorney for the Eastern District of New York, L. Kevin Sheridan, Assistant United States Attorney, of Counsel), *for Appellee.*

Appendix "A"—Opinion of The United States Court of Appeals For the Second Circuit

JULIUS A. ITZKOWITZ, New York, N. Y. (Henry M. Holzer, of Counsel), *for Defendant-Appellant.*

PER CURIAM:

Peter Thomas Messina appeals from a judgment of conviction entered after a trial by jury in the United States District Court for the Eastern District of New York. Appellant was found guilty on Count I of a three-count indictment, which charged him with having conspired with his brother, John Messina, to sell unlawfully counterfeit plates, in violation of 18 U.S.C. §§ 474 and 371. Appellant contends on appeal that (1) Count I of the indictment was fatally defective in that it failed to charge an offense, and failed to furnish a description of the offense sufficient to enable him to prepare a defense and to protect him against future jeopardy; (2) the evidence was insufficient to warrant submission of the case to the jury; and (3) the conviction cannot stand since it was based entirely on the uncorroborated testimony of a co-conspirator. We reject all three contentions and affirm the judgment of conviction.

The facts, briefly stated, are as follows. On September 29, 1971, John Messina was arrested after attempting to sell to undercover Secret Service Agent Albert Angelone, for $35,000, aluminum photo-engraved plates for counterfeiting Ten Dollar Federal Reserve Notes. Later that same day appellant was arrested, on the basis of information provided by John Messina that his brother had provided him with the plates, together with a number of

sample "uncut" and one "cut" counterfeit bills, for sale to Agent Angelone. The two brothers were indicted on three counts. Count I, which we discuss *infra*, charged defendants with conspiring to sell counterfeit plates; the two substantive counts charged them with unlawful possession of plates from which counterfeit bills had been printed, in violation of 18 U.S.C. § 474; and with unlawful possession of a counterfeit Ten Dollar Reserve Note, in violation of 18 U.S.C. § 472. Prior to trial John Messina pleaded guilty to Count I and, after appellant's trial, was given a suspended sentence and three years' probation. John Messina testified as a government witness at appellant's trial.

At trial the government called three witnesses: John Messina and Secret Service Agents Angelone and George J. Opfer. Appellant was the only witness for the defense. John Messina testified that appellant had invited him to join the counterfeiting venture in a telephone call made by appellant in early September, 1971. He further testified that he and his brother thereafter had engaged in a series of meetings and telephone conversations regarding the sale of the counterfeit plates; and that he, John, had met several times with Agent Angelone, who had been introduced to him by a government informant as a potential buyer of the plates. After receiving the plates from appellant, John met with Angelone to complete the sale, whereupon he was promptly arrested. Agent Angelone never met or dealt with appellant.

Agent Angelone's testimony corroborated that of John Messina, regarding their several meetings and their agree-

ment to sell and purchase the counterfeit plates; Angelone also testified that John Messina made several references to an unnamed accomplice during their negotiations. Agent Opfer testified that, following the arrest of the two brothers, he had overheard a conversation in which John allegedly said to his brother, "Pete, we have to cooperate, * * * [t]hey caught me red-handed with the plates"; to which Peter allegedly replied, "You are the one that got caught. Why did you get me involved. You should take your own medicine. You know what happens to stool pigeons." (Trial Transcript at 221).

Testifying in his own defense, appellant denied having made the foregoing remarks, denied any involvement whatsoever in the enterprise, and argued that his brother was falsely implicating him in the crime as a result of fraternal animosity of long standing. He further testified that he had "records" at home to prove that he was at work during the time the events of this case occurred; and that, furthermore, he had not even been on speaking terms with his brother during the time period involved. He indicated, however, that it had not occurred to him to produce these records at trial as part of his defense. The jury chose to believe John Messina's version of the facts, and returned a guilty verdict against appellant on Count I, the conspiracy count, while acquitting on the two substantive counts. Appellant was sentenced to three years' imprisonment.

Count I of the indictment, which appellant challenges on several grounds, provided as follows:

Appendix "A"—Opinion of The United States Court of Appeals For the Second Circuit

[Between certain dates and within the Eastern District of New York] the defendant PETER MESSINA and the defendant JOHN MESSINA did knowingly and wilfully, conspire to commit an offense against the United States in violation of Title 18, United States Code, § 474, by conspiring to sell with unlawful intent, and not under the direction of the Secretary of The Treasury or other proper office, an impression in the likeness of an obligation of the United States, to wit: a Ten Dollar Federal Reserve Note, in violation of Title 18, United States Code, § 371.

In furtherance of said conspiracy and for the purpose of accomplishing the objective thereof, the defendants committed the following acts. * * *

1. On or about the 28th day of September 1971, within the Eastern District of New York, the defendant PETER MESSINA gave the defendant JOHN MESSINA, a counterfeit plate. * * *

Count I was based on language appearing in the sixth paragraph of 18 U.S.C. § 474.[1]

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[1] This section provides:

Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; * * *.

* * *

Shall be fined not more than $5,000 or imprisoned more than fifteen years, or both.

Appendix "A"—Opinion of The United States Court of Appeals For the Second Circuit

Appellant argues first that Count I was defective in not stating the necessary elements of a crime, since it failed to negative the exception, provided in § 474, for sales made to the United States. The cases rejecting this argument are numerous. We deal here with a conspiracy count. The Supreme Court has held that such a count need only "identify the offense which the defendants conspired to commit * * *", and that it need not "with technical precision, state all the elements essential to the commission of the [substantive] crimes * * *." *Williamson* v. *United States*, 207 U.S. 425, 447 (1908). In *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922) the Court held that "an indictment or other pleading founded on a general provision defining the elements of an offense, * * * need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and * * * it is incumbent on one who relies on such an exception to set it up and establish it." To similar effect is *Edwards* v. *United States*, 312 U.S. 473, 482-83 (1941); *see also*, *United States* v. *Ramzy*, 446 F.2d 1184, 1186 (5th Cir.), *cert. denied*, 404 U.S. 992 (1971); *Hockenberry* v. *United States*, 422 F.2d 171, 173 (9th Cir. 1970); *Tritt* v. *United States*, 421 F.2d 928, 929-30 (10th Cir. 1970); *Smith* v. *United States*, 269 F.2d 217, 220 (D.C. Cir.), *cert. denied*, 361 U.S. 865 (1959). It stretches credulity for appellant to argue that he was not fully apprised of the nature of the charge against him because the indictment failed to negative the exception provided. Quite obviously, sale to the United States of materials it needs in printing Federal Reserve Notes is not a crime; and whether or not the

exception was negatived in the indictment, appellant was amply informed of the crime with which he *was* charged.

Appellant's second and third challenges to the indictment —that the indictment did not furnish a sufficient description of the crime charged to enable him (1) to prepare a defense and (2) to be protected against future jeopardy— are equally without merit. We find no ambiguity in the indictment such as would support the two contentions proffered by appellant. We fail to see how it could not have been obvious to Messina that he was being charged with conspiring to sell unlawfully counterfeit plates ("impressions") in violation of 18 U.S.C. § 474, since one of the overt acts listed in the conspiracy count was that "the defendant Peter Messina gave the defendant John Messina a counterfeit plate"; since the second count of the indictment charged appellant with possession of "plates from which a counterfeit obligation [was] printed"; and since in requesting in a bill of particulars as to Count I appellant wanted information from the government specifying "[t]he exact locations, including street addresses where the alleged illegal conspiracy took place to sell counterfeit plates."[2] Appellant was thus provided with specific notice regarding the crime with which he was charged, for purposes of preparing his defense. The specter of future jeopardy which appellant raises is unsupported, since there is little doubt as to the crime for which appellant was indicted and convicted.

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[2] Notice of Motion for Bill of Particulars and Discovery and Inspection, dated April 14, 1972, at page 1.

Appellant's remaining arguments on appeal deal with the sufficiency of the evidence upon which he was convicted. It is first alleged that the evidence was not sufficient to prove beyond a reasonable doubt that appellant was involved in the conspiracy, and that, under *United States* v. *Taylor*, 464 F.2d 240 (2d Cir. 1972) the case should not have gone to the jury. We disagree. The evidence was ample to enable a reasonable juror "fairly [to] conclude guilt beyond a reasonable doubt", *Taylor*, *supra*, 464 F.2d at 245. In addition to the testimony of the co-conspirator, John Messina, the jury could consider the highly incriminating testimony of Agent Opfer, as well as any inferences arising from appellant's failure to produce the "records" which he claimed substantiated his alibi.

Appellant's final argument, that a guilty verdict may not rest upon the uncorroborated testimony of an accomplice, fails in view of this Court's numerous decisions to the contrary. *See, e.g., United States* v. *Ferrara*, 458 F.2d 868, 871 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972); *United States* v. *Phillips*, 426 F.2d 1069, 1071 (2d Cir.), *cert. denied*, 400 U.S. 843 (1970); *United States* v. *Corallo*, 413 F.2d 1306, 1323 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969). Moreover, as indicated above, there was corroborating testimony in this case.

Accordingly, we affirm the judgment of conviction.

APPENDIX "B"

Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

72 CR 316

UNITED STATES OF AMERICA

—against—

PETER MESSINA, JOHN MESSINA,

Defendants.

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 30th day of August 1971 and the 29th day of September 1971, both dates being approximate and inclusive, within the Eastern District of New York, the defendant PETER MESSINA and the defendant JOHN MESSINA, did knowingly and wilfully, conspire to commit an offense against the United States in violation of Title 18, United States Code, § 474, by conspiring to sell with unlawful intent, and not under the direction of the Secretary of The Treasury or other proper office, an impression in the likeness of an obligation of the United States, to wit: a Ten Dollar Federal Reserve Note, in violation of Title 18, United States Code, § 371.

In furtherance of said conspiracy and for the purpose of accomplishing the objectives thereof, the defendants committed the following overt acts.

OVERT ACTS

1. On or about the 28th day of September 1971, within the Eastern District of New York, the defendant PETER MESSINA gave the defendant JOHN MESSINA, a counterfeit plate.

2. On or about the 28th day of September 1971, within the Eastern District of New York, the defendant PETER MESSINA and the defendant JOHN MESSINA, had a conversation.

COUNT TWO

On or about the 29th day of September 1971, within the Eastern District of New York, the defendant PETER MESSINA and the defendant JOHN MESSINA, knowingly and wilfully and without permission of the Secretary of The Treasury of the United States, did have in their custody, control and possession, plates from which a counterfeit obligation have been printed, with the intent to use such plate and to suffer the same to be used in counterfeiting a part of an obligation of the United States, to wit: a Ten Dollar Federal Reserve Note, in violation of Title 18, United States Code, § 474.

Appendix "B"—Indictment

COUNT THREE

On or about the 1st day of August 1971, within the Eastern District of New York, the defendant PETER MESSINA and the defendant JOHN MESSINA, with intent to defraud, did keep in their possession a counterfeit Ten Dollar Federal Reserve Note bearing Serial # B62096377A, knowing the same to be falsely made, forged and counterfeited, in violation of Title 18, United States Code, § 472.

A TRUE BILL

Foreman

United States Attorney

APPENDIX "C"

Colloquy between Trial Court, Government Counsel, and Petitioner's Counsel concerning Indictment's wording.

The Court: Now, the conspiracy that is alleged is one to sell a ten dollar Reserve Note. If the government establishes beyond a reasonable doubt that the conspiracy did exist, that this defendant—and it's by what the testimony shows this defendant said or did, direct testimony of what he said or did, knowingly and wilfully entered into the conspiracy —that means he was aware of what was going on, in doing it he knew he was violating the law, he did it with intent to violate the law, prove that this defendant entered into the conspiracy and that the act or the conversation was in furtherance of the conspiracy, if it was to negotiate, to sell a note, to sell a counterfeit note, then it's part of the conspiracy, it's within the objective of the conspiracy and during the term of the conspiracy, then the defendant is bound by what John Messina said and did if you find John Messina was also a member of the conspiracy, even though this defendant was not present, even though he didn't know of what was going on. If it was within the scope of the conspiracy, for the purposes of the conspiracy, during the term of the conspiracy, then he's bound by what John Messina said or did. If the government doesn't establish all that beyond a reasonable doubt, then you must disregard it.

Mr. Clarey: If I may be heard just a moment concerning the conspiracy count.

The Court: The jury may be excused.

(The jury was excused.)

Appendix "C"—Colloquy between Trial Court, Government Counsel, and Petitioner's Counsel concerning indictment's wording.

Mr. Clarey: The only exception I would take to your charge on the conspiracy count is that the conspiracy is alleged as a violation of 474 of Title 18, in a conspiracy to sell an impression in the likeness of an obligation which is, in fact, a counterfeit plate. In your instruction, you indicated that it was a conspiracy to sell a counterfeit note. The facts of the case are, and the count alleges, conspiracy to violate 474.

The Court: Never mind what the facts of the case are. Let's talk about what's alleged. By conspiring to sell with unlawful intent an impression in the likeness of an obligation of the United States. Is that a plate?

Mr. Clarey: Yes, it is. That's the statutory language.

The Court: A likeness of an obligation?

Mr. Clarey: That's the statutory language in 474, the plate section, as opposed to 472, which is the counterfeit note section.

The Court: To wit, a ten dollar Reserve Note. Does this count allege that they were trying to sell a plate or a note?

Mr. Clarey: A plate in the impression of an obligation, the obligation being a ten dollar Reserve Note.

The Court: All right, I will reserve decision on that. I will look at the section.

Seat the jury.

(The jury entered the jury box.) (181-183)

The Court: We will talk more about a little confusion I have about the indictment and the way it's all charged after the summation.

Appendix "C"—Colloquy between Trial Court, Government Counsel, and Petitioner's Counsel concerning indictment's wording.

Mr. Clarey: I hate to beg off, but I did not draft the indictment.

The Court: I tried to make out the initials.

Mr. Clarey: Sheerin unfortunately did it and he did it hurriedly because I was not—I was in Westbury trying a case.

The Court: This has a "C" here, Robert A. Morse by "RFC". I thought it was your handiwork.

Mr. Clarey: No. My name is "RLC".

The Court: That may be "RLC".

Mr. Clarey: I may have to take responsibility. I didn't present this to the Grand Jury.

Mr. Passalacqua: No. Sheerin presented it to the Grand Jury.

The Court: I am talking about the indictment.

Mr. Passalacqua: I will have no objection to your Honor dismissing the indictment because of defectiveness.

The Court: I know you won't. It's not dismissible, I don't think. At least two counts stand up out of the three. I am just troubled by count 2. I try to distillate or extrapolate the essential elements of the crime from what was alleged here and I went back to 474 and I don't know.

Mr. Passalacqua: Will your Honor make a determination on that before you charge the jury?

The Court: Oh, yes. We will talk about that after the summation.

Mr. Clarey: What about the conspiracy count, your Honor, is it a conspiracy to possess plates?

The Court: Well, what do you think?

Mr. Clarey: I think it is.

Appendix "C"—Colloquy between Trial Court, Government Counsel, and Petitioner's Counsel concerning indictment's wording.

The Court: We will go over that.

Maybe we ought to decide that now. You said it was under 474?

Mr. Clarey: Yes.

The Court: You said that when you used a similitude of an obligation that that meant the plates.

Mr. Clarey: It isn't a similitude.

The Court: Of an impression. Find it for me. It's a long section. Maybe I missed it. Incidentally, I think the first paragraph of 474—and I haven't looked at the annotations, but it appears to refer to genuine plates stolen from the government and misused. I don't think the first paragraph refers to simulated plates.

Mr. Clarey: They talk about impression in the same paragraph with engraving, photographic print or impression.

The Court: I am sorry, I don't have another copy of this section. I can't do it this way. I have to have the whole section before me.

Mr. Clarey: The paragraph I was referring to is the second one from the end, they talk about impression.

The Court: I read that: "Whoever prints, photographs or in any other manner makes or executes any engraving, photograph, print or impression in the likeness of any such obligation." What obligation are you talking about, a genuine government obligation, in this case the Federal Reserve Note? "Whoever prints or makes an impression—"

Mr. Clarey: But those plates are a photograph or impression. Those aluminum plates, as Angelone described them on the stand, they are photographs, they are made

Appendix "C"—Colloquy between Trial Court, Government Counsel, and Petitioner's Counsel concerning indictment's wording.

from a photograph of a real $10.00 bill by a photographic process and those are photo sensitized plates.

The Court: All right. So let's go over that section if you think it fall in there. It says: "Whoever prints or makes in any way . . . So that's the maker, right, of that particular plate or sells? That's not what you are charging him with here.

Mr. Clarey: I am talking about the conspiracy count and I am charging him with selling.

The Court: All right, the conspiracy count.

Mr. Clarey: It's conspiring to sell the impression.

The Court: Then why, to wit, a $10.00 Federal Reserve Note?

Mr. Clarey: An impression of an obligation, to wit, refers back to the obligation, Federal Reserve Note being an obligation of the government redeemable for—they are considered an obligation.

The Court: Well, there was a bill of particulars here that might be helpful.

Mr. Clarey: I only amended that as to the last count, so it's accurate as to the other counts.

The Court: The bill of particulars seems to clarify it. Of course, a bill of particulars can't expand the count. "The Defendant Peter Messina gave the defendant John Messina the counterfeit plates." Now, what was the demand for a bill of particulars here? Do I have it? What did you ask for on Count 1?

Mr. Passalacqua: I have a copy of it here.

The Court: May I have a copy of your demand.

Mr. Passalacqua: Here, I will give it to your Honor.

Appendix "C"—Colloquy between Trial Court, Government Counsel, and Petitioner's Counsel concerning indictment's wording.

The Court: No. He was talking about Overt Act 1. It doesn't talk about the objectives of the conspiracy. I think that you tried to frame this first and second count under the first paragraph, and in my humble opinion—I don't know—it just appears to me that this is the type of crime charged in count 1, is that in which a defendant is found in possession, control or custody of the actual printing material, the plates that the government made and prints genuine obligations.

Mr. Clarey: I can't say that the first paragraph was used. I would have to take a look at the other paragraphs.

The Court: Well, there are two other paragraphs that start "whoever has in his control, custody or possession any plate—" this is the one I thought it may be based on—"made after or in similitude of any plate from which any such obligation or security has been printed . . ." and I think or am reading it broadly in the light of what you alleged that you misinterpreted and you thought the obligation printed was printed out of the counterfeit plates. But I read it to refer back to a similitude of any plate and I think it's the fourth section that refers to the control, custody or possession of any plate from which a genuine obligation has been printed.

For example, here it's in the likeness of a genuine $10.00 Reserve Note with intent to use such plate or suffer the same to be used. That's what I am ready to charge on Count 2.

Mr. Clarey: You mean you are charging an obligation rather than a plate? Because—

The Court: No. A plate. But what's confusing here is

Appendix "C"—Colloquy between Trial Court, Government Counsel, and Petitioner's Counsel concerning indictment's wording.

that you are talking about a $10.00 note that was made from this plate, and incidentally the testimony is to the contrary.

Mr. Passalacqua: Right, your Honor.

The Court: There is no $10.00 note.

Mr. Clarey: That's right. But the annotations clearly indicate that it does not have to be used; it's possessed with intent to use.

The Court: In that section, yes. But the intent to use such plate is to make an intent to use in forging such obligation or that such obligation has been printed, passed. It does not refer to the use of the particular plate. It refers back to the genuine plates from which obligations of the government are used. So I would consider that as surplusage, a $10.00 Federal Reserve Note. I think the evidence on the $10.00 Federal Reserve Note refers only to Count 3 and has nothing to do with the other two counts.

Mr. Clarey: I agree.

The Court: All right, I think it's clear enough, but barely so, so that the defendant could fairly prepare for the charge as I interpret it. But all I could say is that it's pretty fudgy.

Mr. Clarey: I agree. I don't recall drafting it, although my signature is on it. (299-307)